Dahlia Dhaima bt Abdullah v Majlis Agama Islam Selangor & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24NCVC-627–05 OF 2021
CHOO KAH SING J
12 FEBRUARY 2022

Civil Procedure — Jurisdiction — Conflict of jurisdiction between High Court and Syariah Court — Plaintiff argued that she did not profess religion of Islam ab initio — Whether civil High Court had jurisdiction to declare that plaintiff was not person professing religion of Islam — Whether plaintiff had locus standi to file action — Whether plaintiff's action res judicata

Constitutional Law — Fundamental liberties — Freedom of religion — Plaintiff sought order that she was not person professing religion of Islam — Whether civil High Court had jurisdiction to hear case — Whether plaintiff's action touched on plaintiff's constitutional rights — Federal Constitution art 11(1)

Islamic Law — Conversion — Conversion of minor children to Islam — Whether Administrative of Islamic Law Enactment 1989 ('Enactment 1989') was the prevailing law for conversion at material time — Whether Enactment 1989 applicable to plaintiff — Whether plaintiff's conversion to Islam was valid — Administrative of Islamic Law Enactment 1989 ss 70 & 74(3) — Administration of Muslim Law Enactment 1952 ss 146 & 147 — Administration of the Religion of Islam (State of Selangor) Enactment 2003

In the present originating summons ('the OS'), the plaintiff sought an order to declare that she 'is not a person professing the religion of Islam'. The plaintiff submitted that: (a) her case was not a case of apostacy ie leaving the faith of Islam religion; (b) in the first place she was never a Muslim; (c) she had not professed or practised the religion of Islam since her purported conversion to Islam; and (d) the conversion took place when she was at a very young age, and the conversion was decided by her Muslim-convert mother. In counterclaim, the first defendant argued that the plaintiff was a vexatious litigant. The issues raised in the present case was in relation to the jurisdiction and the validity of the conversion that took place on 17 May 1991. In respect of jurisdiction, the first defendant submitted that: (i) the civil High Court did not have the jurisdiction to declare that the plaintiff was not a person professing the religion of Islam; (ii) the plaintiff had no locus standi to file the OS in the civil court in

A view that the plaintiff had filed a Syariah Court proceeding before this; (iii) the admission of facts made by the plaintiff in the Syariah Court's proceedings had estopped her from retracting them in the OS; and (iv) the OS was res judicata. In relation to the issue of conversion, the first defendant submitted that the prevailing law for conversion to Islam at that material time was the B Administration of Islamic Law Enactment 1989 ('Enactment 1989') and the first defendant relied on ss 70 and 74(3) of the same.

Held, allowing the plaintiff's application and dismissing the first defendant's counterclaim with no order as to costs:

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(1) Based on the ratio of the apex court in the case of *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181 ('Rosliza bt Ibrahim'), the court had the jurisdiction to hear the plaintiff's OS which was based on the case that the plaintiff had never been a person professing D the religion of Islam. Based on the facts averred in the OS, the court was satisfied that the application pertained to the question of an applicant asserting that she was never a Muslim because she had never professed the religion of Islam and that her conversion was not valid. The application touched on the plaintiff's constitutional right as enshrined in art 11(1) of E the Federal Constitution (see paras 24–25).

(2) The admissions made by the plaintiff in the Syariah Court proceedings were merely statement of facts involving the plaintiff during her early adolescence. The mere fact that she had practised fasting, praying, or had attended religious classes in school, or had attended Islam religious F ceremonials while staying with her Muslim-convert mother and step-father, those experiences or exposures to the Islam religion could not equate to the plaintiff having professed and practised the religion of Islam. 'Experiencing and exposing to a religion' and 'professing and practising a religion' were two distinct matters. Throughout the Syariah G proceedings, the plaintiff did not admit she professed the religion of Islam. What the plaintiff was saying in the present OS was that she did not profess the Islam religion ab initio. Therefore, those admission of facts in the Syariah Court proceedings could not stop her from exercising her constitutional right in the civil court (see paras 28 & 32–33).

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(3) Res judicata was not applicable as the proceedings in the Syariah Court had been nullified by the apex court decision in *Rosliza bt Ibrahim* as the Syariah Court had no jurisdiction to determine the question of the plaintiff's assertion that she did not profess the religion of Islam ab initio I (see para 34).

(4) Although there was a Syariah Court's ruling that decided the plaintiff was a Muslim, it could not remove her locus standi from seeking a remedy in the civil court. The plaintiff's challenge was centered on the issue that she could not be a Muslim despite having allegedly converted to be a Muslim

at the age of five. The plaintiff's application was mounted on her constitutional right seeking a declaration that she was not a Muslim ab initio because she had never professed the religion of Islam. As the apex court in *Rosliza bt Ibrahim* made it clear that in ab initio cases the civil court would be seized of jurisdiction, then a fortiori the plaintiff would have locus standi before the civil court. Further, in the Syariah High Court, the plaintiff had averred that neither did she profess the religion of Islam nor did she choose to practise the teachings of Islam. In the OS, the plaintiff had maintained her narrative. Hence, the court was of the view that the plaintiff did not change her stance or that this application was an afterthought (see paras 37 & 40–41).

(5) The Enactment 1989 only came into force on 1 September 1991. The plaintiff's mother's conversion was on 17 May 1991, which was before the Enactment 1989 came into force. Therefore, Enactment 1989 was not applicable to the plaintiff. The relevant and applicable conversion law at that material time was the Administration of Muslim Law Enactment 1952 ('Enactment 1952') under ss 146 and 147 of the same. Based on the old State law Enactment 1952, children who had yet to attain puberty age could not be converted to Islam religion. On 17 May 1991, to be exact, the plaintiff was only four years and five months old. Hence, the plaintiff's purported conversion to Islam by Jabatan Agama Islam Selangor on 17 May 1991 was against the State law of conversion at that material time. Consequently, the issuance of the conversion card to the plaintiff based on the unlawful conversion would be invalid and unlawful as well (see paras 47, 49, 51–52, 54 & 56).

(6) Based on the above findings, the court found the plaintiff was not validly converted to Islam, and therefore, she could not be a person professing the religion of Islam despite being erroneously identified as a convert-Muslim for so many years. The court had considered the submissions on the applicability of the conversion laws under the Enactment 1989 and the Administration of the Religion of Islam (State of Selangor) Enactment 2003, and the court found both Enactments were not applicable and relevant based on the peculiar facts of this case (see paras 58–59).

(7) The court rejected the first defendant's counterclaim on the basis that the civil court would not shut its door to a person who had a legitimate claim based on his/her constitutional right. The civil court was the bulwark against infringement of constitutional rights. In this case, the plaintiff's right to freedom of religion was in question. It had been demonstrated that the Syariah Court had acted out of bounds in exercising its jurisdiction over the plaintiff. The plaintiff's case was an ab initio case that fell within the jurisdiction of the civil court. As such, the plaintiff

could not in law or fact be a vexatious litigant. This was not a case of repeated litigations relying on the same cause of action (see paras 61–62).

[Bahasa Malaysia summary

Dalam saman pemula ini ('SP'), plaintif memohon perintah untuk mengisytiharkan bahawa dia 'bukan seorang yang menganut agama Islam'. Plaintif berhujah bahawa: (a) kesnya bukan kes murtad iaitu meninggalkan kepercayaan agama Islam; (b) sejak mula lagi dia bukan beragama Islam; (c) dia tidak menganut atau mengamalkan agama Islam sejak dia memeluk Islam; dan (d) penukaran agama tersebut berlaku semasa dia masih kecil, dan penukaran agama tersebut diputuskan oleh ibunya yang memeluk Islam. Dalam tuntutan balas, defendan pertama berhujah bahawa plaintif adalah seorang litigan yang menjengkelkan. Isu-isu yang dibangkitkan dalam kes ini adalah berkaitan dengan bidang kuasa dan keabsahan penukaran agama yang berlaku pada 17 Mei 1991. Berkenaan dengan bidang kuasa, defendan pertama berhujah bahawa: (i) Mahkamah Tinggi sivil tidak mempunyai bidang kuasa untuk mengisytiharkan bahawa plaintif bukanlah seorang yang menganut agama Islam; (ii) plaintif tidak mempunyai locus standi untuk memfailkan SP di mahkamah sivil memandangkan plaintif telah memfailkan prosiding Mahkamah Syariah sebelum ini; (iii) pengakuan fakta yang dibuat oleh plaintif dalam prosiding Mahkamah Syariah telah menghalangnya daripada menarik balik fakta tersebut dalam SP ini; dan (iv) SP adalah res judicata. Berhubung dengan isu penukaran agama, defendan pertama berhujah bahawa undang-undang yang terpakai berkenaan pemelukan agama Islam pada masa yang material ialah Enakmen Pentadbiran Undang-undang Islam 1989 ('Enakmen 1989') dan defendan pertama bergantung kepada ss 70 dan 74(3) Enakmen yang sama.

Diputuskan, membenarkan permohonan plaintif dan menolak tuntutan balas defendan tanpa perintah berkenaan kos:

(1) Berdasarkan alasan-alasan mahkamah tertinggi dalam kes *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181 ('Rosliza bt Ibrahim'), mahkamah mempunyai bidang kuasa untuk mendengar SP plaintif yang berasaskan kepada kes bahawa plaintif tidak pernah menjadi seorang yang menganut agama Islam. Berdasarkan fakta yang dikemukakan dalam SP, mahkamah berpuas hati bahawa permohonan tersebut adalah berkaitan dengan persoalan seorang pemohon yang menegaskan dia tidak pernah beragama Islam kerana dia tidak pernah menganut agama Islam dan penukaran agamanya tidak sah. Permohonan tersebut menyentuh hak perlembagaan plaintif seperti mana yang termaktub dalam perkara 11(1) Perlembagaan Persekutuan (lihat perenggan 24–25).

(2) Pengakuan yang dibuat oleh plaintif dalam prosiding Mahkamah Syariah hanyalah kenyataan fakta yang melibatkan plaintif semasa zaman

remajanya. Fakta bahawa dia pernah berpuasa, solat, atau menghadiri kelas agama di sekolah, atau menghadiri upacara keagamaan Islam semasa tinggal bersama ibu dan bapa tirinya yang mualaf, pengalaman atau pendedahan tentang agama Islam tersebut tidak boleh disamakan dengan plaintif telah menganut dan mengamalkan agama Islam. 'Mengalami dan mendedahkan kepada agama' dan 'menganut dan mengamalkan agama' adalah dua perkara yang berbeza. Sepanjang prosiding Syariah, plaintif tidak mengaku dia menganut agama Islam. Apa yang plaintif katakan dalam SP ini ialah dia tidak menganut agama Islam ab initio. Oleh itu, pengakuan fakta dalam prosiding Mahkamah Syariah tidak dapat menghalangnya daripada mendapatkan hak perlembagaannya di mahkamah sivil (lihat perenggan 28 & 32–33).

(3) Res judicata tidak terpakai kerana prosiding di Mahkamah Syariah telah terbatal oleh keputusan mahkamah tertinggi di dalam kes *Rosliza bt Ibrahim* kerana Mahkamah Syariah tidak mempunyai bidang kuasa untuk menentukan persoalan penegasan plaintif bahawa dia tidak menganut agama Islam ab initio (lihat perenggan 34).

(4) Walaupun terdapat keputusan Mahkamah Syariah yang memutuskan plaintif adalah seorang Islam, ia tidak dapat menafikan locus standi plaintif untuk mendapatkan remedi di mahkamah sivil. Cabaran plaintif tertumpu kepada isu bahawa dia bukan seorang Muslim walaupun didakwa telah memeluk Islam pada usia lima tahun. Permohonan plaintif adalah berdasarkan hak perlembagaannya untuk mendapatkan pengisytiharan bahawa dia bukan seorang Muslim ab initio kerana dia tidak pernah menganut agama Islam. Oleh kerana mahkamah tertinggi di dalam kes *Rosliza bt Ibrahim* telah menjelaskan bahawa dalam kes-kes ab initio mahkamah sivil mempunyai bidang kuasa, maka dengan itu plaintif mempunyai locus standi di hadapan mahkamah sivil. Selanjutnya, di Mahkamah Tinggi Syariah, plaintif telah menegaskan bahawa dia tidak menganut agama Islam dan tidak memilih untuk mengamalkan ajaran Islam. Dalam SP ini, plaintif telah mengekalkan naratifnya. Oleh itu, mahkamah berpandangan bahawa plaintif tidak mengubah pendiriannya atau bahawa permohonan ini adalah pemikiran terkemudian (lihat perenggan 37 & 40–41).

(5) Enakmen 1989 hanya berkuat kuasa pada 1 September 1991. Penukaran agama ibu plaintif adalah pada 17 Mei 1991, iaitu sebelum Enakmen 1989 berkuat kuasa. Oleh itu, Enakmen 1989 tidak terpakai kepada plaintif. Undang-undang penukaran agama yang relevan dan terpakai pada masa yang material ialah Enakmen Pentadbiran Undang-undang Muslim 1952 ('Enakmen 1952') di bawah ss 146 dan 147 Enakmen yang sama. Berdasarkan Enakmen Undang-Undang Negeri 1952 yang lama, kanak-kanak yang belum mencapai umur baligh tidak boleh memeluk agama Islam. Pada 17 Mei 1991, secara tepatnya, plaintif baru berusia

empat tahun lima bulan. Oleh itu, penukaran agama plaintif kepada agama Islam oleh Jabatan Agama Islam Selangor pada 17 Mei 1991 adalah bertentangan dengan undang-undang penukaran agama Negeri pada masa tersebut. Akibatnya, pengeluaran kad penukaran agama kepada plaintif berdasarkan penukaran agama yang menyalahi undang-undang juga akan menjadi tidak sah dan menyalahi undang-undang (lihat perenggan 47, 49, 51–52, 54 & 56).

(6) Berdasarkan dapatan-dapatan di atas, mahkamah mendapati plaintif tidak memeluk Islam secara sah, dan oleh itu, dia tidak boleh menjadi seorang yang menganut agama Islam walaupun telah tersilap dikenal pasti sebagai mualaf selama bertahun-tahun. Mahkamah telah mempertimbangkan hujahan mengenai kebolehgunaan undang-undang penukaran agama di bawah Enakmen 1989 dan Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003, dan mahkamah mendapati kedua-dua Enakmen tersebut tidak terpakai dan tidak relevan berdasarkan fakta spesifik kes ini (lihat perenggan 58–59).

(7) Mahkamah menolak tuntutan balas defendan pertama atas dasar bahawa mahkamah sivil tidak akan menutup pintunya kepada seseorang yang mempunyai tuntutan yang sah berdasarkan hak perlembagaannya. Mahkamah sivil adalah benteng terhadap pelanggaran hak perlembagaan. Dalam kes ini, hak plaintif untuk kebebasan beragama dipersoalkan. Telah dibuktikan bahawa Mahkamah Syariah telah bertindak di luar batasan dalam melaksanakan bidang kuasanya ke atas plaintif. Kes plaintif adalah kes ab initio yang termasuk dalam bidang kuasa mahkamah sivil. Oleh itu, plaintif bukanlah seorang pelitigasi yang menjengkelkan di sisi undang-undang atau fakta. Ini bukan kes litigasi berulang yang bergantung pada kausa tindakan yang sama (lihat perenggan 61–62).]

Cases referred to

Azmi bin Mohamad Azam @ Roneey v Director of Jabatan Agama Islam Sarawak & Ors [2017] 9 MLJ 541; [2016] 6 CLJ 562, HC (refd)

Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1; [1991] 1 CLJ Rep 77, SC (refd)

Hj Raimi bin Abdullah v Siti Hasnah Vangarama bt Abdullah and another appeal [2014] 3 MLJ 757; [2014] 4 CLJ 253, FC (refd)

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545; [2018] 3 CLJ 145, FC (refd)

Kamariah bte Ali dan lain-lain lwn Kerajaan Negeri Kelantan dan satu lagi [2005] 1 MLJ 197, FC (refd)

Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain [2007] 4 MLJ 585; [2007] 3 CLJ 557, FC (refd)

Majlis Agama Islam Pulau Pinang v Siti Fatimah Tan Abdullah [2009] 1 CLJ (Sya) 162 (refd)

Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 181; [2021] 3 CLJ 301, FC (folld)
S Thaiyalnayagam v GM Kodaguda [1983] 1 MLJ 242 (refd)
Sim Kooi Soon v Malaysia Airlines System (No 2) [2011] 4 MLJ 728, CA (refd)
Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 1 MLJ 489; [1999] 2 CLJ 5, FC (refd)
Sykt Sebati Sdn Bhd v Pengarah Jabatan Perhutanan & Anor [2019] 2 MLJ 689, FC (refd)

Legislation referred to

Administration of Islamic Law (Federal Territories) 1993 s 2
Administration of Islamic Law Enactment 1989 ss 70, 74(3), 87
Administration of Muslim Law Enactment 1952 ss 145, 146, 147, 148, Parts I, II, III, IV, V, VI, VII, VIII, X
Administration of the Religion of Islam (State of Selangor) Enactment 2003 s 123
Federal Constitution arts 11, 11(1), 12, 12(4)
Law Reform (Marriage and Divorce) Act 1976

Surendra Ananth a/l Anandaraju (Surendra Ananth); Nurul Hidayah Mohd Azmi with him (Nurul & Assoc) for the plaintiff.
Majdah Muda (Muda) for the first defendant.
Nur Irmawatie (Husna bt Abdul Halim with her) (Selangor State Legal Advisor's Office) for the second defendant.

Choo Kah Sing J:

INTRODUCTION

[1] The plaintiff's originating summons sought for an order to declare that she 'is not a person professing the religion of Islam'. The plaintiff's originating summons was opposed by the first defendant Majlis Agama Islam Selangor ('MAIS') being the chief administrative body of all matters relating to the religion of Islam in the State of Selangor and the second defendant, the Selangor State Government.

[2] In essence, the plaintiff contended that her case was not a case of apostacy — leaving the faith of Islam religion. The plaintiff contended that in the first place she was never a Muslim. She had not professed or practised the religion of Islam since her purported conversion to Islam. The conversion took place when she was at a very young age, and the conversion was decided by her Muslim-convert mother.

A THE SALIENT BACKGROUND FACTS

[3] The plaintiff was born on 17 November 1986 to a non-Muslim married couple. Her late father was of Indian descent and professed the religion of Hinduism; whereas, her mother is of Chinese descent and was born to a
B Buddhist family. The plaintiff's parents' marriage was solemnized under the Law Reform (Marriage and Divorce) Act 1976.

[4] In or around 1991, the plaintiff's parents decided to end their relationship and go separate ways. The plaintiff's mother took the plaintiff with
C her, and they decided to stay in Selayang Baru, Selangor. At that material time, the plaintiff was only around five years of age.

[5] Pending a divorce proceeding, the plaintiff's mother decided to embrace
D the Islamic faith as her choice of religion because she intended to marry to a Muslim man after her divorce proceeding was completed.

[6] On 17 May 1991, the plaintiff's mother went to the Jabatan Agama Islam Selangor ('JAIS') and took the affirmation of faith (or the *Kalimah*
E *Syahadah*). At the same time, the plaintiff was converted to become a Muslim at the age of around five. The mother took the name 'Farah Hor Binti Abdullah' and the plaintiff took the name 'Dahlia Dhaima Binti Abdullah' after the conversion. On the same day, the JAIS issued a conversion card to the plaintiff's mother. As for the plaintiff, the conversion card was issued two years
F later on 28 August 1993 after the plaintiff had turned seven.

[7] The plaintiff's mother averred that her divorce proceedings with the plaintiff's father was completed when a decree absolute was granted by the civil High Court on 18 December 1992. The civil High Court also granted the
G plaintiff's mother the custody, care and control of the plaintiff. The plaintiff continued living with her mother after the plaintiff's parents' divorce. Eventually, the plaintiff's mother married one Zafri bin Manap on 10 April 1993. The plaintiff lived with her mother and stepfather.

H **[8]** When she was around 17 years of age, the plaintiff moved out from her mother's house and boarded at the Kolej Tunku Abdul Rahman during her tertiary education. After her graduation in 2010, the plaintiff decided to stay with her aunt in Bangsar, Kuala Lumpur. Sometime in 2015, the plaintiff decided to stay by herself.

I **[9]** The plaintiff's mother reveals in her affidavit (see *afidavit sokong* (2), affirmed on 10 May 2021, encl 3) that, first, she did not inform the plaintiff's father that she had decided to convert the plaintiff to become a Muslim. Secondly, that the plaintiff's father did not give his approval or consent for the

plaintiff's conversion even until the day of his demise in a road accident on 22 March 1996. Thirdly, the plaintiff did not take the affirmation of faith during her conversion to Islam; and the plaintiff did not understand and know what was transpiring on that material day and time. Lastly, that the plaintiff had not professed and practised the faith of Islam religion since the time the plaintiff was living with her until the present time. The plaintiff's mother further averred that the plaintiff has been professing and practising the religion of Hinduism since the time she was living with her until the present time.

[10] The plaintiff averred that she has been professing and practising the religion of Hindu since young, and that she has been frequenting Hindu Temples with her relatives (from the paternal side) and celebrating Hindu festivals. The plaintiff further averred that she has not celebrated any Muslim festival or adopted any Islamic belief. She also has not attended any mosque or prayed according to the Muslim faith. Further, the plaintiff averred that her mother and stepfather have allowed her to profess and practise her chosen faith which is Hindu religion.

THE FINDINGS OF THIS COURT

[11] During the oral hearings, the counsels from both sides agreed that there were only two main issues before this court. First, the issue of jurisdiction, and secondly, the issue of the validity of the conversion that took place on 17 May 1991.

[12] The first defendant raised two issues for determination in relation to the jurisdiction of the civil court. First, the first defendant's counsel contended that the civil High Court does not have the jurisdiction to declare that the plaintiff is not a person professing the religion of Islam. Secondly, the first defendant's counsel questioned the locus standi of the plaintiff in filing this originating summons in the civil court in view that the plaintiff had filed a Syariah Court proceeding before this.

Jurisdiction

[13] With regard to the issue of jurisdiction, the first defendant's counsel contended that in pith and substance the plaintiff's prayer concerned the determination of the issue of 'aqidah' or the plaintiff's belief in the Islamic faith which falls squarely within the jurisdiction of the Syariah Court. The first defendant's counsel cited the Federal Court decision *Hj Raimi bin Abdullah v Siti Hasnah Vangarama bt Abdullah and another appeal* [2014] 3 MLJ 757 at p 769; [2014] 4 CLJ 253 at p 269, wherein it was held that 'it is settled law that the question of whether a person is a Muslim or not is a matter falling under the exclusive jurisdiction of the Syariah Court'. The first defendant's counsel also

A cited a string of cases in support of this proposition.

[14] The second defendant's counsel submitted that the plaintiff's identity card has stated that the plaintiff is a Muslim and that she has been carrying that status for the past 23 years and using her Muslim name for the past 30 years. As such, the challenge to her status that she was not a person professing the religion of Islam would be saying she no longer wanted to be a Muslim. That being the case, it was a matter within the purview of the Syariah Court's jurisdiction.

[15] The Syariah High Court and Syariah Appeal Court had determined the plaintiff's status as a Muslim. Thus, the plaintiff being a Muslim and electing to say 'she was no longer a Muslim' would be a question of 'determination of status of Islam of a person'. This question surely fell within the jurisdiction of the Syariah Court, the second defendant's counsel submitted. The second defendant's counsel cited the authorities of *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1; [1991] 1 CLJ Rep 77 (SC), *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489; [1999] 2 CLJ 5 (FC), *Kamariah bte Ali dan lain-lain lwn Kerajaan Negeri Kelantan dan satu lagi* [2005] 1 MLJ 197 (FC) and *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585; [2007] 3 CLJ 557 (FC).

[16] This court followed the guidance from a recent Federal Court decision of *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181 at p 212; [2021] 3 CLJ 301 at p 334. The apex court has made a clear distinction to the circumstances in which the Syariah Court's jurisdiction would seize over the question whether a person is a Muslim or not, and this is what the Federal Court held:

> [85] ... It is only when one's faith is the main subject matter of the dispute does such dispute fall within the jurisdiction of the Syariah Court. In this regard, there is a significant distinction between 'one who no longer professes the religion of Islam' on the one side, and 'one who never professes the religion of Islam', on the other ...

[17] The Federal Court explained that in the event the situation pertains to leaving the Islamic faith (apostasy), then it would fall within the jurisdiction of the Syariah Court. However, at para [90], the apex court went on to state as follows:

> [90] At this juncture, a very fundamental distinction identified earlier, emerges. There is a critical distinction between 'no longer a Muslim' on the one side, and 'never was a Muslim', on the other. The former refers to renunciation cases which as explained, fall within the jurisdiction of the Syariah Courts. The latter, which may be loosely described as *ab initio* cases, cannot, on a coherent application of the law, fall within the jurisdiction of the Syariah Courts ...

[18] In *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585; [2007] 3 CLJ 557, the applicant was originally a Muslim and chose to leave the religion. In *Majlis Agama Islam Pulau Pinang v Siti Fatimah Tan Abdullah* [2009] 1 CLJ (Sya) 162, the applicant originally was a non-Muslim, then voluntarily converted to become a Muslim, but later decided to leave the religion. In these situations, the question of leaving the Islamic faith, would surely fall within the jurisdiction of the Syariah Court, explained the apex court.

[19] The apex court went on to make a distinction of the facts between the two cases cited above and a High Court decision in *Azmi bin Mohamad Azam @ Roneey v Director of Jabatan Agama Islam Sarawak & Ors* [2017] 9 MLJ 541; [2016] 6 CLJ 562. In this High Court case, the applicant originally was raised as a Bidayuh Christian. However, at young age, the parents chose for him the religion of Islam and converted him as a Muslim. However, he was not brought up as a Muslim. In gist, the applicant challenged that the Syariah Court has no jurisdiction over him because he was not a Muslim in the first place.

[20] At para [98], the apex court states as follows:

> [98] What can be distilled from *Lina Joy* and like cases on the one side, and *Azmi* and like cases on the other, is that it is a matter of proof that the person affirmatively professed the religion of Islam at the material time. Absent of such proof, the case may be classified as an ab initio case.

[21] In our present case, the plaintiff did not show she had affirmatively professed the religion of Islam since her conversion at a very young age until the present. The plaintiff averred throughout her affidavits that she was never a Muslim.

[22] The apex court at para [99] has this to say when dealing with the question of applicants asserting that they 'never have been a Muslim':

> [99] Reverting to the question: do the civil courts possess jurisdiction to determine the status of persons who claim to 'never have been Muslim' as opposed to 'no longer a Muslim'? The answer to the question must naturally be in the affirmative as otherwise there would be no legal recourse for persons of the ab initio category. When it concerns a renunciation case, the civil courts have consistently held that it was within the jurisdiction of the Syariah Courts conferred under art 121(1A) of the FC. For the record, learned senior federal counsel appearing for the attorney general as amicus curiae, agreed that it is the civil courts that have jurisdiction over persons of 'ab initio category'.

[23] In summary, the apex court held as follows:

A [108] The case is no different here. At the risk of repetition, if a matter concerns an ab initio case, that is, the question whether a person is in the first place a 'person professing the religion of Islam' it necessarily concerns a question regarding one's identity under the FC which in turn necessitates constitutional interpretation. This is because the phrase 'persons professing the religion of Islam' is a constitutional B term. Accordingly, the civil courts are empowered, indeed, duty-bound to adjudicate the matter. It is only in renunciation cases where one already professes or proclaims to profess the religion of Islam (irrespective of whether they actually practise the faith) with the subsequent decision to change what they profess, that the matter is removed to the jurisdiction of the Syariah Court. The distinction drawn from the cases of *Lina Joy* and *Azmi* illustrates the difference. Whether it is an ab C initio case or a renunciation case will require a careful examination of the factual matrix of the case.

[24] Based on the above ratio of the apex court, this court has no hesitation D to hold that this court has the jurisdiction to hear the plaintiff's originating summons which is based on the case that the plaintiff had never been a person professing the religion of Islam.

[25] Based on the facts averred in the originating summons, this court is E satisfied that the application pertains to the question of an applicant asserting that she was never a Muslim because she has never professed the religion of Islam and that her conversion was not valid. The application touches on the plaintiff's constitutional right as enshrined in art 11(1) of the Federal Constitution.

F

[26] The defendants' counsels further submitted that the plaintiff is bound by the decisions of the Syariah Courts (including the plaintiff's appeal to the Mahkamah Rayuan Syariah Kuala Lumpur which was dismissed). Further, the first defendant's counsel submitted that the admission of facts made by the G plaintiff in the Syariah Court's proceedings has estopped her from retracting them in the originating summons.

[27] The first defendant's counsel submitted that the plaintiff had admitted that she did follow the practices of fasting and praying, and she attended H religious classes in school as well as attended Islam religious ceremonials while staying with her Muslim-convert mother and stepfather. The plaintiff could also utter the affirmation of faith and explained what 'Syahadah' is to the Syariah Court, the first defendant's counsel further submitted. The first defendant's counsel also further submitted that the plaintiff actually went I through eight sessions of Syariah counselling at the Jabatan Agama Islam Wilayah Persekutuan (JAWI) during the Syariah Court proceedings. All these converged to the fact that she professed the religion of Islam. Hence, the Syariah Court should be seized of jurisdiction for the application, the first defendant's counsel submitted.

[28] This court is of the considered view that those admissions made by the plaintiff in the Syariah Court proceedings were merely statement of facts involving the plaintiff during her early adolescence. The mere fact that she had practised fasting, praying, or had attended religious classes in school, or had attended Islam religious ceremonials while staying with her Muslim-convert mother and stepfather, those experiences or exposures to the Islam religion could not equate to the plaintiff having professed and practised the religion of Islam.

[29] During early adolescence, research has shown that a child 'owes it to their parents to comply with reasonable religious requests because a refusal to learn their parents' religious beliefs is contrary to their obligation to show goodwill' (see Emile Lester, *Gratitude and Parents' rights over their Children's Religious Upbringing* (2004) Journal of Beliefs & Values, Vol 25, No 3, 295–306, p 305).

[30] It is manifest in our cultures and traditions that children are taught their filial duties regardless of their race and religion. A child's experience of a religion at early adolescence is very much prescribed by the wishes of his/her parents. This is observed in the case of *S Thaiyalnayagam v GM Kodaguda* [1983] 1 MLJ 242 at p 244 (HC), wherein, it was held that a child attending a place of worship and participating in the religious ceremonies there could not be taken as of any significance to the child's religion, because being at a very young age the child would go to any place if taken there by the elders and the child would participate in any ceremony if asked to do so by the elders.

[31] The above proposition is very much preserved in art 12(4) of the Federal Constitution. For a child below the age of 18, what religious instruction to receive, what religious ceremony to take part and what act of worship of a religion to participate in shall be decided by the child's parent or guardian. Hence, in the present case, the plaintiff was merely experiencing, exposing to and learning a religion chosen by her Muslim-convert mother. Even then, the plaintiff's mother did not stop the plaintiff from experiencing and exposing to other religion, such as Hindu religion when she was young.

[32] 'Experiencing and exposing to a religion' and 'professing and practising a religion' are two distinct matters. The former is a form of learning experience which is a part of the fundamental human right in relation to education, ie, religious education. As such, this right is aptly placed under art 12 — *Rights in respect of education* of the Federal Constitution. Whereas, the latter is a fundamental human right in respect of freedom of choice to declare one's religion and one's rights to perform and express that religion; that right, subject to limitation, is clearly embedded in art 11 — *Freedom of religion* of the Federal Constitution. Hence, art 12(4) of the Federal Constitution granted the

parent(s) or guardian(s) the constitutional right to decide what religious education and experience a child below the age of 18 should be exposed to before the child turns the age of 18.

[33] On the present facts, the plaintiff merely narrated her experiences, associations and exposures to the religion of Islam when she was young. She was being truthful during the Syariah proceedings. However, throughout the Syariah proceedings, she did not admit she professed the religion of Islam. The plaintiff did not retract her statements or admissions in the Syariah proceedings in this originating summons. What the plaintiff was saying in this originating summons was that she did not profess the Islam religion ab initio. Therefore, those admission of facts in the Syariah Court proceedings could not stop her from exercising her constitutional right in the civil court.

[34] On the same issue of jurisdiction, the first defendant's counsel also submitted that the proceeding in the originating summons was res judicata. This court is of the considered view that res judicata was not applicable as the proceedings in the Syariah Court has been nullified by the apex court decision in *Rosliza bt Ibrahim* as the Syariah Court had no jurisdiction to determine the question of the plaintiff's assertion that she did not profess the religion of Islam ab initio (see *Sykt Sebati Sdn Bhd v Pengarah Jabatan Perhutanan & Anor* [2019] 2 MLJ 689 at p 235 (FC)).

Locus standi

[35] With regard to the challenge of locus standi of the plaintiff, the first defendant's counsel submitted that the plaintiff had admitted having resided in Kuala Lumpur and had filed a summons at the *Mahkamah Tinggi Syariah Wilayah Persekutuan* via Case Number 14100–043–0968–2013 ('Syariah Case No 043') on 12 December 2013 seeking a declaration that she was no longer a Muslim. The first defendant counsel further submitted that the plaintiff's action was inconsistent as in the Syariah Case No 043, the plaintiff sought for a declaration that 'she was no longer a Muslim'. Whereas, in this originating summons, she sought for a declaration that 'she is not a person professing the religion of Islam'. The first defendant counsel submitted that the prayer in the originating summons was an afterthought.

[36] The first defendant's counsel also submitted that according to the finding of the Syariah High Court in the Syariah Case No 043, the status of the plaintiff was found to fall within the definition of a Muslim (*orang Islam*) under s 2 of the Administration of Islamic Law (Federal Territories) 1993 (*Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993*). As such, the plaintiff would not have locus standi to file this originating summons in the civil court. The plaintiff was bound by the decision of the Syariah High

Court dated 20 July 2017, the first defendant's counsel further submitted.

[37] Although there is a Syariah Court's ruling that decided the plaintiff is a Muslim, it could not remove her locus standi from seeking a remedy in the civil court. The plaintiff's challenge was centred on the issue that she could not be a Muslim despite having allegedly converted to be a Muslim at the age of five. The plaintiff's application was mounted on her constitutional right seeking a declaration that she is not a Muslim ad initio because she has never professed the religion of Islam. As the apex court in *Rosliza bt Ibrahim* makes it clear that in ad initio cases the civil court would be seized of jurisdiction, then a fortiori the plaintiff would have locus standi before the civil court.

[38] The plaintiff filed her summons in the Syariah High Court out of necessity in 2013. This was because at that time the law was opaque as to the demarcation of jurisdiction over the questions of 'never was a Muslim' and 'no longer a Muslim'. The Syariah jurisdiction and civil jurisdiction became clear after *Rosliza bt Ibrahim* has been decided by the apex court.

[39] With regard to the contention that the plaintiff in this originating summons had prayed for an order that she 'is not a person professing the religion of Islam' as opposed to her earlier summons in the Syariah Court seeking for a declaration that 'she was no longer a Muslim', this court has examined the decision of the Syariah High Court dated 20 July 2017 (see exh 'DD7', plaintiff's affidavit affirmed on 10 May 2021, encl 2).

[40] Throughout the plaintiff's narrative at the Syariah High Court (see the *pernyataan tuntutan*, particularly para 14, exh 'DD8', plaintiff's affidavit affirmed on 10 May 2021, encl 2, pp 65–69), she had averred that neither did she profess the religion of Islam (at the time of her conversion) nor did she choose to practise the teachings of Islam.

[41] In this originating summons, the plaintiff has maintained her narrative. Hence, this court is of the considered view that the plaintiff's did not change her stance or that this application was an afterthought.

[42] The present law has allowed the plaintiff to exercise her constitutional right in a civil court which was not available before the decision of *Rosliza bt Ibrahim*. As such, although the plaintiff had gone through the motion in the Syariah High Court to assert her right, but failed, that whole exercise has become a futility in law. The plaintiff could not be precluded from having locus standi before the civil court to call upon the determination of a right enshrined in the Federal Constitution.

The conversion

[43] The first defendant's counsel submitted as follows:

> Defendan Pertama berhujah bahawa saat Plaintif dan Farah Hor binti Abdullah memeluk agama Islam pada 17/05/1991 Enakmen Pentadbiran Perundangan Islam 1989 ('Enakmen 1989') merupakan undang-undang terpakai dan berkuatkuasa. Enakmen 1989 telah memansuhkan enakmen terdahulu dan ia terhenti terpakai berdasarkan Seksyen 87 Enakmen 1989 iaitu:
>
> Bahagian I, II, III, V, VI, VII, VIII dan IX; Enakmen 1952 [En. 3/52] adalah dengan ini termansuh dan hendaklah dengan ini terhenti daripada dipakai di Negeri Selangor.

[44] According to the first defendant's counsel's submission, the prevailing law for conversion to Islam at that material time was the Administration of Islamic Law Enactment 1989 ('the Enactment 1989'). The first defendant's counsel further relied on s 70 of the Enactment 1989 which stated as follows:

> Section 70 Consequential conversion of children
>
> If, at the moment of conversion to Islam, a *muallaf* whether male or female, has any natural child who has not attained the age of majority according to Hukum Syara' (*baligh*), the child becomes converted to Islam at the same moment.

[45] Relying on the above section, the first defendant argued that the plaintiff (at that time she was still not attained the age of majority) became 'automatically' converted to Islam at the same time as her mother was converted to Islam. Therefore, the conversion of the plaintiff to Islam was valid and in accordance with the State law.

[46] The first defendant counsel further submitted that s 74(3) of the Enactment 1989 states that 'a certificate of conversion to Islam shall be conclusive proof of the facts stated therein'.

[47] This court could not agree with the first defendant's submission. The Enactment 1989 only came into force on 1 September 1991 via Sel PU 58/1991. The plaintiff's mother's conversion was on 17 May 1991, which was before the Enactment 1989 came into force. Therefore, how could the Enactment 1989, particularly s 70, apply to the plaintiff?

[48] The Enactment 1989 lasted until 31 August 2003. On 1 September 2003, the Enactment 1989 was repealed by s 123 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('the Enactment 2003) (which came into force on 1 September 2003 via Sel PU 25/2003).

[49] Before the Enactment 1989 came into force on 1 September 1991, the

prevailing law in relation to conversion to Islam was in Part VIII (ss 145–148) of the old State law Administration of Muslim Law Enactment 1952 ('the Enactment 1952'). A

[50] The Enactment 1952 received its Royal Assent on 11 October 1952. The Enactment 1952 was in force until 31 August 1991. Then the Enactment 1952, particularly Parts I, II, III, V, VI, VII and VIII, was repealed by s 87 of the Enactment 1989 on 1 September 1991. With regard to Parts IV and X of the Enactment 1952, they were eventually repealed by s 123 of the Enactment 2003 on 1 September 2003. B C

[51] On 17 May 1991, the day the plaintiff's mother converted to Islam, the conversion law to Islam that should apply was still the old State law under Part VIII (ss 145–148) of the Enactment 1952, and not the Enactment 1989. The Enactment 1989 had yet come into force on 17 May 1991. It only came into force on 1 September 1991, as stated earlier. D

[52] Based on the chronology of the State laws that came into force, and taking into consideration the conversion date on 17 May 1991, therefore, the relevant and applicable conversion law at that material time was the Enactment 1952. The relevant conversion law in the Enactment 1952 was s 146 which stated as follows: E

> S 146 Control of conversion
>
> No person shall be converted to the Muslim religion otherwise than in accordance with the provisions of this enactment or any rules made thereunder. F

[53] And, s 147 of the Enactment 1952 stated as follows:

> S 147 No conversion of children
>
> No person who has not attained the age of puberty shall be converted to the Muslim religion. G

[54] Based on the old State law Enactment 1952, children who had yet to attain puberty age could not be converted to Islam religion. On 17 May 1991, to be exact, the plaintiff was only four years and five months old. Hence, the plaintiff's purported conversion to Islam by the JAIS on 17 May 1991 was against the State law of conversion at that material time. H

[55] On 28 August 1993, JAIS issued the conversion card to the plaintiff. Pursuant to s 74(3) of the Enactment 1989 (which had already come into force on 1 September 1991) 'a certificate of conversion to Islam shall be conclusive proof of the facts stated therein'. I

[56] This court is of the considered view that although the conversion card was issued after two years from the time of the plaintiff's purported conversion, the conversion card could not be valid. This is because the plaintiff's conversion to Islam was against the law at that time and unlawful in the first place, a fortiori the issuance of a conversion card to the plaintiff based on an unlawful conversion on 17 May 1991 would be invalid and unlawful as well.

[57] Further, if s 74(3) of the Enactment 1989 applied in the present case, it would be based on the fact that the plaintiff's conversion was as a result of s 70 of the same Enactment. Section 74(3) could not apply because s 70 of the Enactment 1989 had yet come into force on 17 May 1991. Hence, the issuance of her conversion card could not be valid and could not be a conclusive proof of the facts stated therein.

[58] Hence, this court finds the plaintiff was not validly converted to Islam, and therefore, she could not be a person professing the religion of Islam despite being erroneously identified as a convert-Muslim for so many years.

[59] This court has considered the respective counsels' submissions from both sides on the applicability of the conversion laws under the Enactment 1989 and Enactment 2003, and this court finds both Enactments were not applicable and relevant based on the peculiar facts of this case.

[60] This court has also considered the decision of the apex court in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 3 CLJ 145, and is of the view the issue of unilateral decision made by the plaintiff's mother to convert the plaintiff to become a Muslim is not relevant. This is because from the onset the conversion that took place on 17 May 1991 was an unlawful one under the applicable State law at that material time.

The first defendant's counterclaim — Vexatious litigant

[61] This court rejected the first defendant's counterclaim on the basis that the civil court would not shut its door to a person who has a legitimate claim based on his/her constitutional right. The civil court is the bulwark against infringement of constitutional rights. In this case, the plaintiff's right to freedom of religion was in question. It has been demonstrated that the Syariah court had acted out of bounds in exercising its jurisdiction over the plaintiff. The plaintiff's case was an ab initio case that fell within the jurisdiction of the civil court.

[62] As such, the plaintiff could not in law or fact be a vexatious litigant. This is not a case of repeated litigations relying on the same cause of action (see *Sim*

Kooi Soon v Malaysia Airlines System (No 2) [2011] 4 MLJ 728 (CA)).

CONCLUSION

[63] Based on the above reasoning, this court allowed the plaintiff's application and dismissed the first defendant's counterclaim, and made no order as to costs for either party.

Plaintiff's application allowed; defendant's counterclaim dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar